File: A30 430 253 - Seattle

Date: JUL 11 2000

In re: FLORENCE DORLHENE a.k.a. Florence Dany Dorlhene a.k.a. Florence Dany Dorlene a.k.a. Dorlene Melara a.k.a. Florence Dany Melara a.k.a. Florence Dany Darlhene

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kaaren L. Barr, Esquire

ON BEHALF OF SERVICE: Thomas P. Molloy
Assistant District Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

Sec. 237(a)(2)(B)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(B)(ii)] - Drug abuser or addict

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] - Convicted of crime of domestic violence, stalking, or child abuse, neglect, or abandonment

APPLICATION: Cancellation of removal

The respondent's appeal of an Immigration Judge's January 26, 2000, decision finding her removable as an aggravated felon and pretermitting her application for cancellation of removal will be sustained. We grant the respondent's appeal fee waiver request and consider this appeal without payment of fee. *See* 8 C.F.R. § 3.8(c).

The respondent's argument on appeal relates solely to her being charged as removable as an aggravated felon (Notice of Appeal; Respondent's Br.).[1] She maintains that the Immigration Judge incorrectly considered her conviction for being under the influence of a controlled substance as

[1] The respondent does not contest the Immigration Judge's findings of removability on any other basis, and his determinations in this regard have not been disturbed.

comparable to a conviction for possession of a controlled substance in evaluating whether she had committed an aggravated felony (Respondent's Br.). The respondent asserts that, as she has not been convicted of an aggravated felony, the Immigration Judge erred in pretermitting her application for cancellation of removal.

The record reflects that the respondent has been convicted on numerous occasions in differing jurisdictions for a variety of offenses. In pertinent part, the Immigration and Naturalization Service charged the respondent as removable in light of a June 21, 1989, conviction for use/under the influence of a controlled substance, and November 22, 1991, convictions for possession of a controlled substance and possession of controlled substance paraphernalia (Exhs. 1, 2, 3). According to the records of conviction, these crimes were committed in violation of California Health and Safety Code ("CHSC") sections 11550, 11377(a) and 11364, respectively (Exhs. 1, 2, 3).

We have held that in order for a conviction to constitute an aggravated felony under section 101(a)(43)(B) of the Immigration and Nationality Act, a state controlled substance conviction for an offense that has no demonstrated nexus to illicit trafficking in drugs must be analogous to an offense defined in 18 U.S.C. § 924(c)(2), and must constitute a crime that would be considered a felony under federal law. *See Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995). A drug-related "aggravated felony" is defined in section 101(a)(43) of the Act to include any "drug trafficking crime" as defined in 18 U.S.C. § 924(c)(2). That section in turn defines a "drug trafficking crime" as "any felony punishable under" the Controlled Substances Act, the Controlled Import and Export Act, or the Maritime Drug Enforcement Act. 18 U.S.C. § 924(c)(2).

The only drug trafficking crime under either of the noted statutes which is comparable to the respondent's conviction for possession of drug paraphernalia is 21 U.S.C.A. § 863, entitled "drug paraphernalia." However, that section punishes the sale, import/export, and/or interstate transport of drug paraphernalia, not mere possession of the same. As such, there is no federal statute under which the respondent could have been convicted given the scant information before us, and the state statute at issue is not "analogous" to 21 U.S.C.A. § 863. Therefore, this conviction cannot form a basis upon which the respondent is found removable as an aggravated felon.

The Immigration Judge found without comment that the respondent's conviction for use/being under the influence of a controlled substance constituted a "drug-related offense" and, in conjunction with the respondent's conviction for possession of a controlled substance, constituted an aggravated felony (I.J. at 4). Our review, however, of relevant federal statutes fails to disclose the existence of any analogous law which penalizes the use of a controlled substance. Federal statutes exist which relate to the manufacturing, importing, exporting, trafficking, distribution, dispensing, and/or possession of controlled substances, and any attempt or conspiracy to commit any of these acts.[2] However, there is no analogous federal statute which penalizes the bare use and/or being under the

[2] For example, see 21 U.S.C. §§ 841 et seq. and 960 et seq.

influence of a controlled substance. Moreover, we note that section 11550 of the CHSC is a highly divisible statute and, given the dearth of evidence regarding the respondent's conviction, would unlikely be construed as analogous to a federal drug-related statute, even if one existed.

Given these facts, we cannot uphold the Immigration Judge's finding that respondent has been convicted of an aggravated felony. This is not a case involving two convictions for possession of a controlled substance. Rather, the respondent has a single such conviction, which we have found does not constitute an aggravated felony. *See Matter of L-G-, supra*; *see also Matter of K-V-D-*, Interim Decision 3422 (BIA 1999). As such, the Immigration Judge erred in pretermitting the respondent's application for cancellation of removal. *See* section 240A(a)(3) of the Act; *Matter of Noble*, 21 I&N Dec. 672 (BIA 1997). Accordingly, the following order shall be entered.

ORDER: The respondent's appeal is sustained with regard to the Immigration Judge's finding of removability under section 237(a)(2)(A)(iii) of the Act, and the record is remanded to the Immigration Judge in order to permit the respondent an opportunity to pursue an application for cancellation of removal. We express no opinion as to the outcome of those proceedings.

FOR THE BOARD